

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

JANICE THOMPSON and  
DONALD L. THOMPSON,

Plaintiffs,

vs.

No. CIV 98-1034 JC/WWD

WAL-MART STORES, INC.,  
a Delaware corporation,

Defendant.

**MEMORANDUM OPINION AND ORDER**

THIS MATTER came on for consideration of Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, filed September 23, 1998 (*Doc. 5*). The Court has reviewed the motion, the memoranda submitted by the parties, and the relevant authorities. The Court finds that Defendant's motion is not well taken and will be denied.

Plaintiff Janice Thompson claims that she was injured while shopping at an Albuquerque Wal-Mart store when one or more bags of cat litter fell on her head while she was passing through the store's pet department. Defendant moves for dismissal of "Plaintiffs [*sic*] claims contained in Count IV of their Complaint for Personal Injuries, based on the doctrine of *res ipsa loquitur*." (Def.'s Mem. in Supp. at 4.)


I find this to be an inappropriate juncture for consideration of the *res ipsa loquitur* doctrine. Whether Wal-Mart had "exclusive control and management" of the litter bags is an evidentiary

question to be determined once testimony is before the Court. I will, therefore, deny Defendant's motion to dismiss.

Wherefore,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, filed September 23, 1998 (*Doc. 5*), is **denied**.

DATED this 15<sup>th</sup> day of October, 1998.

  
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CHIEF UNITED STATES DISTRICT JUDGE

Counsel for Plaintiffs: Edward F. Snow  
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